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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-1757

MICHAEL PATRICK CLANCEY,  
Petitioner,  
vs.

THE UNITED STATES HOUSE OF  
REPRESENTATIVES; CARL ALBERT,  
INDIVIDUALLY AND IN HIS OFFICIAL  
CAPACITY AS SPEAKER OF THE UNITED  
STATES HOUSE OF REPRESENTATIVES;  
JOHN J. FLYNT, JR., INDIVIDUALLY  
AND IN HIS OFFICIAL CAPACITY AS THE  
CHAIRMAN OF THE COMMITTEE ON  
STANDARDS OF OFFICIAL CONDUCT  
FOR THE UNITED STATES HOUSE OF  
REPRESENTATIVES; AND ANDREW J.  
HINSHAW, INDIVIDUALLY AND IN HIS  
OFFICIAL CAPACITY AS CONGRESSMAN  
IN THE UNITED STATES HOUSE OF  
REPRESENTATIVES,

MOTION  
FOR  
LEAVE TO  
FILE AND  
PETITION  
FOR WRITS  
OF PRO-  
HIBITION  
AND  
MANDAMUS

Respondents.

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Now comes MICHAEL PATRICK CLANCEY, and moves  
that the above entitled honorable court grant him leave to file  
the Petition for Writs of Prohibition and Mandamus annexed  
hereto and agreeably to its prayer that the United States

House of Representatives and the other named defendants, be  
commanded to vacate Rule 43, Section 10 of the House Code  
of Official Conduct and be prohibited from acting or not  
acting in accordance therewith, on the ground that said rule is  
unconstitutional.

The facts giving rise to the present application are set forth  
in detail in the Petition annexed, and there is appended to said  
Petition, a certified copy of the aforementioned Rule 43.  
Section 10.

The matter must be decided prior to the November General  
Elections which, as stated in the petition, will render the  
matter "moot" therefore denying all U.S. Citizens the  
protection needed from the aforementioned rule and its  
possible future enactment.

The relief sought was granted in the case of Adam Clayton  
Powell vs. McCormack, (Speaker of the House) by this  
honorable court. See 138 O.T. 68, 395 U.S. 486. (1969)

WHEREFORE, Petitioner prays that this motion for leave  
to file be granted; or, in the alternative, that this motion for  
leave to file be set down for oral argument, following the  
course pursued in Collett and related cases, 335 U.S. 897.

Respectfully Submitted

MICHAEL P. CLANCEY

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Respondents.

PETITION  
FOR WRITS  
OF  
PROHIBITION  
AND  
MANDAMUS

Plaintiff MICHAEL PATRICK CLANCEY, a citizen of the  
United States, by and through his attorney MARK A. SMITH,  
respectfully petitions the Court for a writ of mandamus and  
for a writ of prohibition to require the United States House of  
Representatives to comply with the mandate of this Court

issued in the case of Powell vs. McCormack, No. 138, October  
Term, 1968 (395 U.S. 486).

The constitutional articles and provisions involved, the  
questions presented and the statement of the case with respect  
to this petition are nearly identical to those presented in  
Powell vs. McCormack, supra. Similarly, the same  
considerations that justified the ruling in the Powell case  
should equally warrant the issuance of a writ of mandamus  
and writ of prohibition to enforce the mandate of this court,  
for the plaintiff in this case seeks essentially the same relief by  
way of said writs except that unlike in the Powell case the  
plaintiff herein would support the expulsion of the subject  
congressman from his seat in the House and instead is  
questioning their failure to do so by constitutional means.

REASONS FOR GRANTING THE WRITS

We are of the view that the House of Representatives refusal  
to comply with this Court's mandate in Powell vs. McCormack,  
supra, can be corrected by writ of mandamus and/or  
prohibition.

In the case of Marbury vs. Madison 1 Cranch 137, 2 LEd. 60  
[1803] the Supreme Court held that it had the power to  
review Acts of Congress and declare them void if repugnant to  
the Constitution.

Although the Constitution did not expressly confer this  
power on the court it was held to be implied from the  
"Supremacy Clause" [Article VI Section 2] which provides  
that the Constitution and those "Acts of Congress made in  
pursuance thereof" shall be the Supreme law of the land.

The court in the Powell case held that the Constitution only  
demands that elected representatives to the House of  
Representatives meet three requirements, i.e., be a citizen of  
the United States, twenty-five years of age or older and a  
resident of one state. Furthermore, the court said, Article I,  
Section 5 of the Constitution only gives the House the  
authority to expel an elected member by a two-thirds vote  
when he fails to meet the aforementioned standing



requirements. Expulsions for any other reasons or other restrictions placed on a member's eligibility to take his seat in Congress and vote, therefore, would constitute a violation of that representative's constituent's constitutional rights.

#### STATEMENT OF THE CASE

1. On or about January 26, 1976, the defendants denied plaintiff and other United States Citizens residing within the 40th Congressional District in the State of California, their constitutional right to be represented in the aforementioned House of Representatives by not allowing Congressman, Andrew J. Hinshaw to vote or participate in Congressional matters pursuant to Rule XLIII (43), Section 10 of the House Code of Official Conduct. (Certified copy attached herewith as Exhibit).

2. On or about January 26, 1976, said Congressman Andrew J. Hinshaw was convicted of two counts of felony bribery. Congressman Hinshaw is still allowed his seat in the House of Representatives and is drawing his full salary and benefits. In accordance with the aforementioned resolution said representative is prevented from representing the citizens of the aforementioned 40th District since he may not participate in committees or vote on the House floor.

3. Plaintiff herein contends that said Rule 43, Section 10 of the House Code of Official Conduct is unconstitutional and is in contravention of Article I, Section 5 of the Constitution of these United States of America and other provisions of said Constitution, and asserts that it imposes a taxation upon himself and the other citizens of the said 40th District, without representation.

4. Plaintiff further contends that the aforesaid House resolution is totally defective and inappropriate and that it should be replaced by a House proposal to amend the Constitution of the United States to provide additional qualifications for members of Congress in addition to those prescribed in Article I, Section 5, and therein to establish a Code of Ethics which shall create a method and guidelines

through which a member of Congress can be exp<sup>e</sup>lled and replaced for certain wrongdoings.

5. Plaintiff additionally asserts that this matter should be conclusively decided prior to the November General Election since if not, then the case will become automatically moot in light of the fact that no actual controversy will thereafter exist in that Congressman Hinshaw who is making a bid for re-election will either be re-elected or replaced by a successor which, in either event, will take him outside of the scope of the aforementioned Rule 43, Section 10. It is extremely important that the constitutionality of said Rule be decided so that, if unconstitutional, it won't again be imposed anywhere in this country leaving citizens without representation while nevertheless being taxed for it.

#### JURISDICTION

The relief sought herein is not available in any other court in that; firstly, it is unlikely that the local United States District Court could set a hearing on the within matter before it becomes "moot." Secondly, even if the Court does rule on the matter before the subject Congressman's re-election or replacement, the matter on appeal or certiorari would nevertheless be considered at a time when no actual controversy exists and, on that ground, plaintiff probably would be denied relief.

This honorable Court has held that an actual controversy must exist at all stages of review, not merely when the complaint is filed. The Court "does not sit to decide arguments after events have put them to rest" [DOREMUS v. BOARD OF EDUCATION, 342 U.S. 429 1952]. Relief granted to plaintiff pursuant to this petition is the only adequate protection and remedy available.

**WHEREFORE**, the said plaintiff respectfully requests:

1. That a writ of mandamus be issued out of this honorable court directing and commanding the United States House of Representatives and other named defendants to vacate Rule

43, Section 10 of the House Code of Official Conduct.

2. That a writ of prohibition be issued out of this honorable court prohibiting the United States House of Representatives and the other named defendants from imposing the dictates of Rule 43, Section 10 of the House Code of Official Conduct or in acting or failing to act in accordance therewith.

3. That the Court grant such other and further relief as may be just in the premises.

### VERIFICATION

I am the plaintiff in the above entitled action; I have read the foregoing Motion and Petition and know the contents thereof; and I certify that the same is true of my own knowledge, except as to those matters which are therein stated upon my information or belief, and as to those matters I believe it to be true.

I declare under penalty of perjury, that the foregoing is true and correct.

Executed on May\_\_\_\_, 1976 at Orange County, California.

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MICHAEL P. CLANCEY

Subscribed and sworn to before me  
this\_\_\_\_day of\_\_\_\_, 1976.

Notary Public in and for said County and State.

JUL 18 1976

No. 75-1757

MICHAEL RODAK, JR., CL

**In the Supreme Court of the United States**

OCTOBER TERM, 1976

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v.

**UNITED STATES HOUSE OF REPRESENTATIVES, ET AL.**

\_\_\_\_\_  
**ON MOTION FOR LEAVE TO FILE AND PETITION  
FOR WRITS OF PROHIBITION AND MANDAMUS**

\_\_\_\_\_  
**MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION**

\_\_\_\_\_  
**ROBERT H. BORK,**  
*Solicitor General,*  
*Department of Justice,*  
*Washington, D.C. 20530.*

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UNITED STATES HOUSE OF REPRESENTATIVES, ET AL.

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ON MOTION FOR LEAVE TO FILE AND PETITION  
FOR WRITS OF PROHIBITION AND MANDAMUS

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MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioner, apparently invoking the original jurisdiction of this Court, seeks writs of mandamus and prohibition to compel the United States House of Representatives to vacate the rule of the House Code of Official Conduct under which Congressman Andrew J. Hinshaw, Representative from the 40th Congressional District of California, allegedly has been prevented from voting or otherwise participating in congressional matters (Pet. 3).

This Court lacks jurisdiction to grant the relief. The suit satisfies none of the jurisdictional requirements of 28 U.S.C. 1251 and thus is not cognizable as an original case. The writs cannot be justified as in aid of the Court's appellate jurisdiction since the relief they seek does not relate to any pending litigation in the lower courts. Cf. *Chandler v. Judicial Council*, 398 U.S. 74, 86; see *Marbury v. Madison*, 1 Cranch 137.



If petitioner wishes to challenge the validity or application of a particular rule of the House of Representatives and to seek to enjoin its enforcement, the proper procedure is a suit in the district court.<sup>1</sup>

It is therefore respectfully submitted that the motion for leave to file and the petition for writs of prohibition and mandamus should be denied.

ROBERT H. BORK,  
*Solicitor General.*

JULY 1976.

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<sup>1</sup>That was the procedure followed in *Powell v. McCormack*, 395 U.S. 486, upon which petitioner relies (Pet. 2-3). There this Court exercised its appellate jurisdiction to review the judgment of the court of appeals denying a Congressman's claim that he had been unlawfully excluded from the House of Representatives.